STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 14, 2011
v	No. 296127 Wayne Circuit Court
JULIAN LEIGH EDWARDS, Defendant-Appellant.	LC No. 09-021356-FC

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment without the possibility of parole on the murder conviction, 15 to 60 years' imprisonment on the assault conviction, time served on the felon-in-possession conviction, and two years' imprisonment on the felony-firearm conviction. On appeal, defendant argues that the trial court erred in failing to give a voluntary manslaughter instruction, that the court committed plain error in admitting evidence which constituted hearsay, MRE 801, and whose probative value was substantially outweighed by the danger of unfair prejudice, MRE 403, and that defense counsel was ineffective for failing to object to the inadmissible evidence. None of defendant's arguments warrant reversal. Accordingly, we affirm.

I. FACTS

This case arises from the shooting death of Antoine Brown and gunshot injuries suffered by Babe Franklin that occurred on May 28, 2009. On that date, defendant was living in a one-bedroom apartment with his girlfriend, Jenae Willis, who had a young daughter fathered by Brown during a prior relationship. Franklin testified that Brown had been informed by Willis's sister that defendant was allegedly abusing Brown's child and that Child Protective Services (CPS) had become involved in the matter. Brown communicated this information to Franklin, and Brown indicated that he wanted to talk to defendant. In numerous phone calls between Willis and Brown on the day of the shootings, Willis told Brown that the accusations of child

abuse made against defendant were fabrications.[1] As reflected in the testimony by Willis and Franklin, Brown initially did not know Willis's address, and he kept calling Willis demanding the address. Eventually, Willis's sister gave Brown the address, and Brown asked Franklin to accompany him to the apartment. Franklin claimed that he suggested to Brown that, if defendant was present at the apartment, they simply talk to defendant to discover the truth before doing anything rash. Brown was described by police as being a heavyset man, weighing between 270 and 300 pounds.

At around 9:00 p.m. on May 28, 2009, defendant returned to his apartment with his brother Christopher Edwards (hereafter Edwards) after the two had spent the afternoon together. Edwards indicated that defendant was acting normal and did not appear upset about anything. Willis and her friend Ashley Scott were at the apartment when the brothers arrived, and about five to ten minutes later there were loud knocks on the door. According to Edwards, defendant opened the door just slightly after first peering through the peephole, at which point Brown or Franklin shoved the door wide open and they both barged into the apartment. Edwards testified that defendant was not carrying any weapons when he answered the door, nor did Edwards have knowledge of any weapons being kept in the apartment. Willis testified that she kept a 20-gauge shotgun behind her bedroom door, which belonged to her. Edwards claimed that, upon gaining entry to the apartment, Franklin and Brown physically attacked defendant and that the tussle carried into the apartment's sole bedroom. Edwards did not observe Franklin or Brown carrying any weapons, and Edwards, fearing for his own life, immediately left the apartment. On fleeing, Edwards heard gunshots coming from the apartment building, and he called 911 out of concern for defendant. Edwards never witnessed the shootings inside the apartment. Willis also testified that she did not witness the shootings. She had been in the bedroom sleeping at the time that Franklin and Brown burst into the apartment. Defendant and Franklin came running into the bedroom and were fighting, and Willis immediately got up and locked herself in a bathroom. In a statement to police, Willis indicated that she heard defendant exclaim, "I told you all not to come up in here." At trial, she denied that defendant made the statement. Willis testified that she had not informed defendant about the phone calls between her and Brown. Willis claimed that she did not observe anyone carrying a weapon that evening, and she denied that defendant kept any weapons in the apartment.

Defendant did not testify at trial and the only eyewitness testimony concerning the actual shootings came from Franklin, the surviving victim.[2] Franklin testified that when he and Brown arrived at defendant's apartment complex, another man was leaving the complex, which allowed them to make entry without "buzzing" in. Franklin stated that he and Brown were not carrying any weapons, as they only wanted to speak to defendant; Brown was calm and not irate. Once they reached defendant's and Willis's apartment unit, Brown stood behind Franklin as Franklin

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[1] It is the testimony about child abuse that defendant argues was inadmissible under MRE 403 and the rules of hearsay, MRE 801-806.

[2] Ashley Scott did not testify, nor was there any testimony concerning her whereabouts or actions during the shootings.

knocked on the door. When defendant started to open the door, Franklin asked for Willis and defendant asked "who the f*** are you?" Brown and Franklin then entered the apartment. According to Franklin, defendant proceeded to run toward the bedroom, carrying a shotgun. Franklin had testified at the preliminary examination that he noticed defendant carrying the shotgun when defendant first opened the apartment door. Brown chased defendant into the bedroom and Franklin followed close behind. Upon entering the bedroom, Franklin observed Brown and defendant wrestling over control of the shotgun that defendant had been carrying. Defendant's hands were on the trigger and the barrel of the gun, while Brown's hands were grasping the middle of the shotgun. Just moments after Franklin entered the bedroom, the shotgun discharged, striking Franklin in the left hand and chest. Franklin fell to the floor and then heard the shotgun discharge again, followed by a yell from Brown. Franklin saw defendant push Brown to the floor, and then defendant proceeded to leave the bedroom. Brown had been shot but was still alive.

Defendant, however, soon reentered the bedroom, pointed the shotgun at Brown, and then shot him for the second time. According to Franklin, defendant pulled the trigger again while pointing the gun at Brown, but the gun just clicked and did not fire. Defendant then turned the shotgun on Franklin and pulled the trigger, but the gun did not fire. Defendant instead struck Franklin a couple of times with the barrel of the gun. Franklin was able to stand up, and he started running toward the front door of the apartment. Franklin, however, was then shot in the back with what he believed was a handgun based on the sound of the weapon. He slumped against a wall in the living room and ended up on the ground next to a closet. Franklin observed defendant return to the bedroom, and he then heard the handgun being fired.[3] The forensic pathologist who conducted Brown's autopsy testified that Brown had been shot three times – a shotgun wound to the chest, a shotgun wound to the abdomen, and a handgun wound to the right flank. Franklin testified that defendant then came out of the bedroom and began pacing around the apartment and ranting. Franklin heard defendant yell, "I told you. I told you on the phone if you came over here I was killing somebody." Defendant then made a phone call, telling the person on the other end of the line, "I just shot these two n*****s. Get over here." Franklin testified that defendant proceeded to leave the premises, taking a handgun with him but not a shotgun. Franklin then called 911. He had to step outside the apartment in order to identify the address for the 911 operator, at which point the police had already arrived in light of Edwards' earlier 911 call.

Willis testified that she came out of the bathroom when the gunshots ended, and she saw defendant in the hallway and a man lying in the living room bleeding from the chest. Willis told

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[3] Police testimony established that the following items were discovered in the apartment: a 20-gauge shotgun located behind the bedroom door, a live 20-gauge shotgun shell, three spent 12-gauge shotgun casings in the bedroom, a live .38 caliber round, a speed loader (allows for quick loading of a handgun), and a machete. Police testimony reflected that the spent 12-gauge shotgun casings had been fired from the same weapon, that the 20-gauge shotgun, which could not be loaded with 12-gauge shotgun shells, had not been discharged in the altercation, and that, aside from the 20-gauge shotgun, no other firearms were discovered at the scene.

police in a statement that she observed defendant holding a shotgun after she emerged from the bathroom, but at trial she denied ever seeing defendant holding a gun. Franklin testified that he saw Willis leave the apartment and that he believed that Willis should have recognized Franklin, given that they had met numerous times in the past. Willis had denied recognizing Franklin in the apartment.

The police discovered Brown in a hallway in the apartment, bleeding from his chest but still alive. No weapons were found on Brown, who later perished after being taken by EMS to the hospital. Police testimony indicated that there was blood everywhere in the apartment and that the place looked like a scuffle had occurred. The police did not find any weapons on Franklin, and he informed police that he had been shot by "Moochie," which was defendant's nickname.

Nearly three months after the shooting, the police pulled over a car driven by defendant. He was placed into custody for not having a license, and the police later discovered that there was an outstanding homicide warrant for defendant's arrest. Defendant gave police several incorrect names.

At trial, the jury, as to the issue of homicide, was instructed on the offenses of first-degree and second-degree murder, but the court declined the *prosecutor's* request for a manslaughter instruction. The trial court opined that a voluntary manslaughter instruction would be so similar to the second-degree murder instruction that it would cause juror confusion. The jury was instructed on self-defense, as requested by defendant.

II. ANALYSIS

A. JURY INSTRUCTIONS

Defendant argues that he had a due process right to a properly instructed jury and that the trial court violated that right and made a substantive mistake of law mandating reversal when it declined to give the jury a voluntary manslaughter instruction, which was supported by a rational view of the evidence that established heat of passion and adequate provocation. Defendant contends that the error was not harmless, given that the jury may have found that defendant, while acting with premeditation and deliberation, nonetheless did so in the heat of passion and with adequate provocation.

In *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007), this Court outlined the general principles applicable to claims of instructional error:

> Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her. The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law. Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence. Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently

> protected the rights of the defendant and fairly presented the triable issues to the jury. [Citations omitted.]

The elements of second-degree murder, MCL 750.317, are "(1) death, (2) caused by defendant's act, (3) with malice, and (4) without justification." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). To establish the crime of voluntary manslaughter, the prosecution must prove beyond a reasonable doubt that (1) the defendant killed in the heat of passion, (2) the passion was caused by an adequate provocation, and (3) there was not a lapse of time during which a reasonable person could have controlled his or her passions. *People v McMullan*, 284 Mich App 149, 156; 771 NW2d 810 (2009); *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The degree of provocation required is that which causes a reasonable person to lose control and act out of passion rather than reason. *People v Tierney*, 266 Mich App 687, 714-715; 703 NW2d 204 (2005). In *Mendoza*, 468 Mich at 541, our Supreme Court held that the "elements of both voluntary and involuntary manslaughter are included in the elements of murder." Both forms of manslaughter, therefore, are necessarily included lesser offenses of murder. *Id.* "Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id.*

We find that it is unnecessary to determine whether a rational view of the evidence supported an instruction on voluntary manslaughter, where the issue was waived, and where, assuming error, it was harmless.

Defendant waived the issue when counsel stated that "[w]e are fine" with the instructions. It was the prosecutor who sought a manslaughter instruction, not defendant, and defendant did not voice any agreement, but instead stood silent, when the prosecutor made the request. Defendant expressed satisfaction with instructions solely on first-degree and second-degree murder. If defendant had joined the prosecutor in requesting a voluntary manslaughter instruction, with the two parties forming a united front, the court may very well have decided to so instruct the jury, despite its misgivings.[4] It is apparent from the record that defendant did not desire a voluntary manslaughter instruction. In *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000), our Supreme Court discussed the principle of waiver:

> Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.'" It differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error."

[4] We do find that the trial court's reason for not giving the instruction was not legally sound.

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> In the present case, counsel clearly expressed satisfaction with the trial court's decision to refuse the jury's request and its subsequent instruction. This action effected a waiver. Because defendant waived, as opposed to forfeited, his rights under the rule, there is no "error" to review. [Citations omitted.]

In *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002), this Court found a waiver where the defendant informed the court that there were no objections to the instructions. Accordingly, we find that the claim of instructional error here was waived when defendant expressed to the trial court satisfaction with the instructions as given. We are not prepared to conclude that the prosecutor's request for a manslaughter instruction negated the waiver.[5]

Furthermore, even if not waived, any presumed error would be harmless. Reversal is unwarranted when an error is deemed harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). When a defendant is convicted of first-degree murder and the jury concomitantly rejects a conviction on second-degree murder after being instructed on both degrees of murder, any claim of error for failure to instruct on voluntary manslaughter is harmless. *Sullivan*, 231 Mich App at 520 (alleged error in failing to instruct on voluntary manslaughter was harmless where jury convicted the defendant of first-degree murder and rejected verdicts of second-degree murder and guilty but mentally ill of first-degree and second-degree murder); *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990) (finding harmless error when addressing the same argument and set of facts as presented here and stating, "Where the trial court instructs on a lesser included offense which is intermediate between the greater offense and a second lesser included offense, for which instructions were requested . . . and refused by the trial court, and the jury convicts on the greater offense, the failure to instruct on that requested lesser included offense is harmless . . . ."); see also *People v Beach*, 429 Mich 450, 490-491; 418 NW2d 861 (1988). Here, the jury found defendant guilty of first-degree murder and declined to find him guilty of the lesser included offense of second-degree murder, thereby making any instructional error as to voluntary manslaughter harmless. We reject defendant's argument that the jury's findings that the killing was premeditated and deliberate left open the possibility that the jurors could have also believed that he was acting in the heat of passion, but were denied an opportunity to consider heat of passion. See *Mendoza*, 468 Mich at 535 ("'A defendant properly convicted of voluntary manslaughter is a person who has acted out of a temporary excitement induced by an adequate provocation and not from the deliberation and reflection that marks the crime of murder'") (citation omitted). Reversal is unwarranted.

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[5] We also note that the prosecutor did not specify whether she was asking for a voluntary or involuntary manslaughter instruction, or both. The evidence of the first wave of shootings in the bedroom could be viewed as involving accidental discharges of the shotgun during the struggle over control of the weapon.

B. HEARSAY AND MRE 403

Defendant contends that Franklin's testimony concerning defendant's alleged abuse of Brown's daughter, which information was garnered by Franklin from Brown, constituted highly prejudicial hearsay testimony, making it inadmissible under the hearsay rules and MRE 403.

Generally, the decision whether to admit evidence is reviewed for an abuse of discretion, although underlying preliminary questions of law, e.g., whether a rule of evidence bars admissibility, are reviewed de novo. *Lukity*, 460 Mich at 488. However, because defendant failed to preserve this issue for appeal, we review for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763 (citation omitted). The third requirement necessitates a showing of prejudice, and even after all three requirements are satisfied, reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously compromised the fairness and integrity of the proceedings independent of whether the defendant was innocent. *Id.*[6]

Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible unless it falls into an exception provided by the rules of evidence. MRE 802.

We hold that the testimony concerning alleged abuse of Brown's daughter by defendant did not constitute hearsay, given that it was not elicited for the purpose of proving the truth of the matter asserted, i.e., that defendant abused the girl. Rather, the evidence was presented to explain and establish why Brown and Franklin went to defendant's apartment in the first place.[7] *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995) (statement admitted to show the effect on the hearer is not hearsay); *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009); *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) (statement offered to show why individuals acted the way they did is not hearsay). In the context

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[6] We note that the issue could also be viewed as being waived. *Carter*, 462 Mich at 215. Although the prosecutor first elicited the testimony at issue, defense counsel spent considerable time cross examining Franklin on the matter in an effort to elicit a concession that Brown was extremely angry at defendant. However, as explained below, reversal is unwarranted even under a plain-error analysis.

[7] To the extent that defendant may also be arguing a violation of the Confrontation Clause, US Const, Am VI, the argument fails because the statements were not testimonial in nature. *Davis v Washington*, 547 US 813, 821-822; 126 S Ct 2266; 165 L Ed 2d 224 (2006); *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (Confrontation Clause precludes a witness from testifying about the testimonial statements of another witness who is unavailable for trial, unless the defendant has had a prior opportunity to cross-examine the unavailable witness).

of the hearsay argument, there was no error in allowing the challenged testimony, let alone a plain error.

Defendant also argues that the testimony was not admissible under MRE 403. Defendant contends that Franklin's testimony should have been limited to his simply stating that he and Brown heard something concerning defendant's actions, without divulging the specific information about the abuse.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, MRE 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" All relevant evidence is inherently prejudicial to some extent, and it is only *unfairly* prejudicial evidence that may warrant exclusion. *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994). "'This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock.'" *Fisher*, 449 Mich at 452, quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).

The more the jurors know about the full transaction, the better equipped they are to perform their duties as jurors. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Thus, as our Supreme Court stated in *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978):

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. [Citations omitted.]

Put simply, "[n]ormally the facts and circumstances surrounding the commission of a crime are properly admissible as part of the res gestae." *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979). This holds true even when those circumstances involve other criminal acts. *Delgado*, 404 Mich at 83. When evidence touching on other bad or criminal acts is so blended or connected with the charged crimes that it explains the circumstances of the charged crimes, the evidence is admissible. *Id.*

We hold that, in the context of defendant's argument under MRE 403, there was no error in allowing the challenged testimony, let alone plain error. The testimony concerning the alleged child abuse was inextricably entwined with the criminal offenses that transpired; it explained to the jury the reason why Brown and Franklin went to defendant's apartment and it gave the jury some insight into their mindset, motivation, and intentions. The testimony provided the jury the complete story. The physical altercation and shootings could not be viewed in isolation and required context. Defendant's suggestion on limiting Franklin's testimony to a simple, vague comment that something was heard would have been insufficient to explain the volatile situation

that existed and the aggressiveness by which Brown and Franklin burst into the apartment. Moreover, assuming that the evidence was inadmissible and plain error occurred, defendant has failed to show that he was prejudiced by the testimony, that he was actually innocent, or that the presumed plain error seriously compromised the fairness and integrity of the proceedings independent of whether he was innocent. Reversal is unwarranted.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant contends that trial counsel was ineffective for failing to object to Franklin's testimony regarding the alleged child abuse, as it violated the hearsay rules and MRE 403. Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and constitutional law, which matters are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the basic principles applicable to a claim of ineffective assistance of counsel, stating:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Additionally, we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). In evaluating whether counsel's performance was deficient, we must determine whether counsel's representation fell below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

In light of our ruling above that the testimony was admissible, trial counsel cannot be deemed ineffective because attorneys are not required to raise futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Furthermore, counsel's performance was not deficient, nor has defendant overcome the strong presumption that counsel's failure to object was a matter of sound trial strategy. Indeed, given the self-defense argument proffered by defendant, the evidence could be viewed as being beneficial to defendant for purposes of the larger picture, where testimony of child abuse would have reasonably driven Brown, a large

man, into a rage and caused him to become threatening, such that defendant would have reasonably feared for his life and safety. Finally, considering the nature of the evidence against defendant, even if we found counsel's performance to be deficient, defendant has failed to show the requisite prejudice.[8]

III. CONCLUSION

The trial court's failure to instruct the jury on the offense of voluntary manslaughter does not warrant reversal, where defendant waived the argument, and where any presumed error was harmless. Next, the trial court did not commit error, plain or otherwise, in allowing testimony concerning allegations of child abuse against defendant, where the testimony did not constitute hearsay, and where its probative value was not substantially outweighed by the danger of unfair prejudice. The testimony was necessary in order to give the jury the complete story. Moreover, any presumed error did not prejudice defendant and arguably the whole issue was waived where defendant chose to explore the issue on cross-examination of Franklin. Finally, trial counsel was not ineffective for failing to object to the child abuse testimony, where the testimony was admissible and counsel need not make futile objections, where counsel's performance was not deficient considering that the nature of the testimony could be viewed as beneficial to the claim of self-defense, and where any presumed error was harmless.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Jane E. Markey

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[8] Although we do not discern the argument on review of defendant's brief, we reject any suggestion that defense counsel's act of waiving the issue concerning an instruction on voluntary manslaughter supports reversal based on ineffective assistance. Counsel may have reasonably decided that taking manslaughter off the table could increase the chances of an acquittal by forcing the jury to focus solely on murder in a situation where self-defense was arguable and the victims set the chain of events into motion. Regardless, there was no prejudice where the jury convicted defendant of first-degree murder and rejected a second-degree murder conviction.